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Nos. 87-1918 and 87-2101

In the Supreme Court of the United States

OCTOBER TERM, 1988

TRANS WORLD AIRLINES, INC, PETITIONER

v.

NATIONAL MEDIATION BOARD, ET AL.

DEBORAH K. BOLLER, ET AL., CROSS-PETITIONERS

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly held, in accordance with this Court's decisions in *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees,* 380 U.S. 650 (1965), and *Switchmen's Union* v. *National Mediation Bd.,* 320 U.S. 297 (1943), that the National Mediation Board's decision that certain of petitioner's employees were ineligible to vote in a representation election conducted under the Railway Labor Act, 45 U.S.C. 151 *et seq.*, is not subject to judicial review.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a)[1] is reported at 839 F.2d 809. The opinion of the district court (Pet. App. 14a-29a) is reported at 654 F. Supp. 447. The decisions of the National Mediation Board (Pet. App. 30a-44a) are reported at 13 N.M.B. Nos. 63, 64 and 72.

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[1] Pet. App. refers to the petitioner's appendix in No. 87-1918.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1988. The petition for certiorari in No. 87-1918 was filed by petitioner Trans World Airlines, Inc. (TWA), on May 19, 1988. The cross-petition for certiorari in No. 87-2101 was filed by cross-petitioners Deborah Boller, et al., on June 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Railway Labor Act, 45 U.S.C. 151 *et seq.*, creates a statutory plan for the administrative resolution of labor-management disputes in the rail and air transportation industries. See 45 U.S.C. 151a. To this end, the Act requires that carriers and their employees "exert every reasonable effort to make and maintain agreements * * * and to settle all disputes * * * in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof" (45 U.S.C. 152 First).

The Act specifically guarantees employees "the right to organize and bargain collectively through representatives of their own choosing" (45 U.S.C. 152 Fourth). The Act further provides that the "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter" (45 U.S.C. 152 Fourth). The representative so selected is the exclusive bargaining representative of all the employees of that craft or class, and the carrier is obligated to enter into negotiations with that representative for the settlement of labor disputes. See 45 U.S.C. 152 First and Ninth. See also *Virginian Railway Co.* v. *System Fed'n No. 40,* 300 U.S. 515, 548 (1937).

Section 2, Ninth of the Railway Labor Act authorizes the National Mediation Board to resolve labor representation disputes (45 U.S.C. 152 Ninth). A party that wishes to be certified as a bargaining representative of a craft of a carrier's employees may apply to the Board for an investigation to determine the craft's representation wishes. Section 2 Ninth does not specify the method that the Board must use in conducting an investigation; instead, it authorizes the Board either "to take a secret ballot of the employees involved" or "to utilize any other appropriate method of ascertaining" the representative (45 U.S.C. 152 Ninth). It also provides that "[i]n the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election" (45 U.S.C. 152 Ninth). Section 2 Ninth further directs the Board to determine the wishes of the employees "in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier" (45 U.S.C. 152 Ninth).

If the Board conducts a representation election and the election results in the choice of a representative, the Board certifies the elected individual or organization as the designated representative of the craft or class of the carrier's employees, and certifies "the same to the carrier" (45 U.S.C. 152 Ninth). A representative will be certified by the Board only if a majority of the eligible voters cast ballots favoring representation and one potential representative receives a majority of the valid ballots cast.

2. In January 1986, the International Association of Machinists and Aerospace Workers (Machinists), the International Brotherhood of Teamsters (Teamsters), and the Independent Federation of Flight Attendants (IFFA) filed separate applications with the Board pursuant to Section 2 Ninth of the Act, requesting the Board to investigate

the representation of the "passenger service employees" at TWA. The Board commenced an investigation, appointed a mediator, and authorized a mail ballot election. While these Board proceedings were pending, another category of TWA employees, flight attendants, went on strike. In response, TWA assigned numerous passenger service employees, who volunteered, to work as flight attendants for the duration of the strike. This case involves the eligibility of 302 of these so-called "contingent flight attendants" to participate in the Board's passenger service employees representation election. See Pet. App. 3a-4a, 16a-17a, 30a-31a.

The mediator initially determined that these contingent flight attendants were eligible to vote in the election for the passenger service employees representative, and the Teamsters appealed this eligibility determination to the National Mediation Board (Pet. App. 3a-4a, 16a-17a).[2] The Board held (Pet. App. 30a-38a) that the 302 employees were ineligible to vote within the craft or class of passenger service employees, citing (*id.* at 35a) its prior decisions in *Chicago & N. W. Ry.*, 4 N.M.B. 240 (1965), and *Trans World Airways, Inc.*, 8 N.M.B. 663 (1981). See Pet. App. 30a-38a. Shortly thereafter, the Board issued its decision concerning the representation dispute (*id.* at

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[2] Both TWA and the other unions – the IFFA and the Machinists – opposed the Teamsters' appeal and agreed with the mediator that passenger service employees working temporarily as flight attendants should be allowed to vote.

42a-44a). The election yielded the following results (*id.* at 43a):

Number of eligible employees:	4330
Ballots cast:	
Machinists:	1279
Teamsters:	935
IFFA:	36
Void ballots:	22

A majority of the eligibile employees voted in the election, and the Machinists received a majority of the valid ballots that were cast. The Board accordingly certified the Machinists as the representative of TWA's passenger service employees (*id.* at 42a-44a).

3. TWA brought suit in the United States District Court for the Southern District of Texas to challenge the Board's certification order and to set aside the representation election on the ground that the Board improperly excluded from participation the 302 temporary flight attendants. Several TWA employees (the cross-petitioners) joined TWA's efforts by filing a separate action in the district court. These suits were eventually transferred to and consolidated in the United States District Court for the District of Columbia (Pet. App. 15a-16a & n.1), which dismissed them for lack of subject matter jurisdiction (*id.* at 14a-29a). The court explained (*id.* at 17a):

> It has been established for over 20 years that courts have no authority to review NMB certification decisions in the absence of a showing on the face of the pleadings that the certification decision was a gross violation of the Railway Labor Act or that it violated the constitutional rights of an employer, employee or union.

The court relied on *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees,*

380 U.S. 650 (1965) (*Railway Clerks*), and *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297 (1943) (*Switchmen's Union*), as well as other decisions. The court concluded (Pet. App. 17a) that "plaintiffs have failed to demonstrate either a gross violation of the Act or any violation of the Constitution."

The court of appeals affirmed the district court's decision (Pet. App. 3a-6a), noting that "[j]udicial review of NMB decisions is one of the narrowest known to the law" (*id.* at 4a-5a).[3]

ARGUMENT

The court of appeals' decision is correct and, indeed, is mandated by this Court's decisions in *Railway Clerks* and *Switchmen's Union*. It does not conflict with any decision of this Court or another court of appeals. Accordingly, there is no warrant for further review.

1. Congress has vested the National Mediation Board with plenary authority to resolve representation disputes under the Railway Labor Act and to protect the employees' statutory right under Section 2 Ninth to elect a bargaining representative. See 45 U.S.C. 152 Ninth. This Court has twice recognized in no uncertain terms that Congress intended the Board—and not the judiciary—to

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[3] The court of appeals consolidated TWA's and the cross-petitioner's appeals with a third appeal, from a separate case, in which the Machinists argued that the Railway Labor Act requires TWA to maintain existing working conditions while bargaining with the union. See Pet. App. 1a-3a, 14a-16a & n.1. The Machinists have filed a petition for a writ of certiorari seeking review of the court of appeals' ruling in that appeal. See *International Ass'n of Machinists & Aerospace Workers* v. *Trans World Airlines, Inc.*, No. 87-2069. The National Mediation Board was not a party in the Machinists' action against TWA and is therefore not a respondent to the Machinists' petition.

have the final word in resolving representation questions. As the Court explained, " 'the intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.' " *Railway Clerks,* 380 U.S. at 659 (quoting *Switchmen's Union,* 320 U.S. at 305). The court of appeals was unquestionably correct in holding that "under the principles set forth in *Switchmen's Union* * * * the certification of the [Machinists] as bargaining representative is not reviewable" (Pet. App. 6a). The courts of appeals have uniformly adhered to the principle that Board certification decisions are not subject to judicial review.[4]

This Court did recognize in *Railway Clerks* that while Congress precluded judicial review of Board representation decisions, the courts may afford a remedy for " 'an order of the Board made in excess of its delegated powers and contrary to a *specific prohibition in the Act.*' " 380 U.S. at 659-660 (emphasis in original) (quoting *Leedom* v.

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[4] See, *e.g., Zantop Int'l Airlines, Inc.* v. *National Mediation Bd.,* 732 F.2d 517 (6th Cir. 1984); *British Airways Bd.* v. *National Mediation Bd.,* 685 F.2d 52 (2d Cir. 1982); *Sedalia-Marshall-Boonville Stage Line, Inc.* v. *National Mediation Bd.,* 574 F.2d 394, 397-399 (8th Cir.), cert. denied, 439 U.S. 881 (1978); *International Ass'n of Machinists & Aerospace Workers* v. *National Mediation Bd.,* 425 F.2d 527, 535-536 (D.C. Cir. 1970); *International Bhd. of Teamsters* v. *Brotherhood of Ry. Clerks,* 402 F.2d 196, 205 (D.C. Cir.), cert. denied, 393 U.S. 848 (1968); *Ruby* v. *American Airlines, Inc.,* 323 F.2d 248, 253-256 (2d Cir. 1963), cert. denied, 376 U.S. 913 (1964); *WES Chapter, Flight Engineers' Int'l Ass'n* v. *National Mediation Bd.,* 314 F.2d 234, 236-237 (D.C. Cir. 1962); *Decker* v. *Venezolana,* 258 F.2d 153, 154 (D.C. Cir. 1958); *Rutas Aereas Nacionales, S.A.* v. *Edwards,* 244 F.2d 784, 785 (D.C. Cir. 1957); *American Air Export & Import Co.* v. *O'Neill,* 221 F.2d 829, 830 & n.4 (D.C. Cir. 1954); *Brotherhood of Ry. & S.S. Clerks* v. *Atlantic Coast Line R.R.,* 201 F.2d 36, 38-39 (4th Cir.), cert. denied, 345 U.S. 992-993 (1953).

Kyne, 358 U.S. 184, 188 (1958)). But TWA and the cross-petitioners have failed to state a claim within the " 'narrow limits' " (380 U.S at 660 (citation omitted)) of that rule. Section 2 Ninth authorizes the Board to "designate who may participate in the election and establish the rules to govern the election" (45 U.S.C. 152 Ninth), thus leaving to the Board "the task of selecting the methods and procedures which it should employ" (380 U.S. at 662). The Board acted wholly within that broadly conferred discretion by concluding that, under the facts of this case, passenger service employees acting as "contingent flight attendants" had a " 'present interest in [the] craft or class' " of flight attendants and were therefore outside the passenger service class or craft (Pet. App. 35a (citation omitted). The Board's conclusion did not violate any "specific prohibition" of the Act. Here, as in *Railway Clerks,* the Board's "decision on the matter is not subject to judicial review where there is no showing that it has acted in excess of its statutory authority" (380 U.S. at 669).

TWA .and cross-petitioners also contend (Pet. 25; Cross-Pet. 16) that the Board demonstrated a pro-union bias. But as the court of appeals explained, those allegations also fail to state a claim actionable under *Railway Clerks* because "there is no express statutory duty of neutrality, even if plaintiffs' complaints were taken to adequately allege a violation of such duty" (Pet. App. 5a (footnote omitted)). The district court reached the same conclusion. See *id.* at 19a ("It is unclear whether a proven instance of 'non-neutrality' would constitute a gross violation of a specific provision of the Railway Labor Act * * *. There is no occasion to decide that question, however, because [TWA and cross-petitioners] have failed to proffer any substantial evidence to support [that] claim.").

TWA's other allegations have likewise been rejected by the lower courts. The court of appeals and district court both agreed (*id.* at 5a, 17a-20a) that the pleadings failed to disclose any other Board action that would amount to the sort of "gross violation" of the Act contemplated in *Railway Clerks.* Certainly, this Court does not sit to review whether the two courts correctly decided that factbound issue.[5]

2. TWA strives mightily—primarily by snatching passages out of context and arguing broad generalities concerning labor policy (Pet. 21-29)—to suggest that the court of appeals' decision is in conflict with *Railway Clerks* or *Switchmen's Union.* No such conflict exists. Indeed, TWA's protracted and convoluted arguments simply prove the wisdom of Congress's decision to curtail judicial review of representation decisions, "for it was to avoid the haggling and delays of litigation that such questions were left to the Board" (*Railway Clerks,* 380 U.S. at 671). Similarly without merit is TWA's argument that the decision below conflicts with the Fifth Circuit's decision in *Russell* v. *National Mediction Bd.*, 714 F.2d 1332 (5th Cir. 1983), cert. denied, 467 U.S. 1204 (1984). In *Russell,* the

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[5] There is also no merit to TWA's contention (Pet. 29-30) that it was entitled to conduct discovery concerning its various allegations. Judicially supervised discovery would impose burdensome and time-consuming demands upon the Board and the parties and thus substantially delay a process that Congress intended to take place swiftly and without delay. See *Switchmen's Union,* 320 U.S. at 305. Thus, the courts have denied discovery requests. See *Sedalia-Marshall-Boonville Stage Line, Inc.* v. *National Mediation Bd.*, 574 F.2d 394, 399 (8th Cir.), cert. denied, 439 U.S. 881 (1978) (holding that since "sufficient facts" appeared of record to sustain the district court finding that the Board did not "abrogate a statutory duty," the court would "not consider the allegation that the district court erred in not enforcing discovery against the Board").

Board refused to investigate an individual's application to become the representative of a craft or class of workers of a carrier because it considered his application a subterfuge. The Fifth Circuit held "that the Board breached its clear statutory mandate by not 'processing' Russell's application for investigation into the representational dispute" (714 F.2d at 1341). As we explain above, TWA failed to show that the Board breached any statutory duty here. Certainly, it is indisputable that the unions' applications for investigations of the representation dispute were processed in this case.

CONCLUSION

The petition and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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